UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1347
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DENNIS FRALEY,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Texas
(CR3-87-073-G)

(November 3, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Dennis Fraley, *pro se* and *in forma pauperis*, appeals from the dismissal of his petition for writ of error *coram nobis* and the denial of his motions for change of venue and recusal of a magistrate judge. We **DISMISS** the appeal from the denial of the motion for change of venue; **AFFIRM**, in part, and **DISMISS**, in part, the appeal from the denial of the motion for recusal; **VACATE** the judgment dismissing the petition, and **REMAND** for further proceedings.

I.

Fraley was convicted in June 1987, for, *inter alia*, causing the transportation of an explosive in interstate commerce with the intent to kill or injure another. His sentence included 40 years

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

imprisonment. The convictions were affirmed on appeal. ***United States v. Fraley***, 858 F.2d 230 (5th Cir. 1988), *cert. denied*, 488 U.S. 1033 (1989).

In January 1990, Fraley filed a Fed. R. Crim. P. 33 motion for a new trial, alleging as grounds: newly discovered evidence; the knowing use of perjured testimony and false evidence; a ***Brady***[2] violation; prosecutorial and governmental misconduct at all stages of the proceedings; the use of the incorrect standard of proof; ineffective assistance of counsel; and "overall unfairness". Fraley also filed a series of post-conviction motions, including a motion for the return of his property seized during a search.

The district court denied the motion for a new trial as untimely to the extent that it was based on any grounds other than newly discovered evidence, and on the merits to the extent that it was based on newly discovered evidence. The court granted Fraley's motion for the return of his property and for leave to file exhibits, but denied all of his other post-conviction motions. Our court, in an unpublished opinion, affirmed the district court's rulings.[3] ***United States v. Fraley***, No. 90-1638 (5th Cir. June 27, 1991).

Thereafter, in August 1991, Fraley filed a "Petition and Motion for Error Coram Nobis Writ and Relief". The district court denied the petition and Fraley's motion for reconsideration. Fraley's motions for change of venue and recusal of the magistrate judge were also denied.

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[2] ***Brady v. Maryland***, 373 U.S. 83 (1963).

[3] In our opinion affirming the denial of Fraley's motion for a new trial, we noted that his principal brief in that appeal exceeded the page limitations set forth in Local Rule 28, and cautioned him regarding repetition of such conduct. Fraley's opening brief in this appeal contains ten roman numeral pages and 45 arabic numeral pages. The last six of the former should have been included in calculating the number of pages allowed by Local Rule 28. *See* Fed. R. App. P. 28(g). Moreover, most of the pages in both his opening brief and his 22-page reply brief contain 30 lines of double-spaced text (three more than the 27 lines allowed by Local Rule 32.1), and most lines of text range from 7 to 7 1/4 linear inches, in excess of the 6 1/2 linear inch limit provided in Local Rule 32.1. Fraley is again warned that any future failure to comply with the rules regarding the length of briefs filed with this court will result in the imposition of appropriate sanctions.

II.

Fraley contends that the district court erred in dismissing his petition for writ of error *coram nobis* and denying his motions for change of venue and recusal.

A.

"When a defendant is no longer in custody, a writ of error *coram nobis* is the appropriate procedural vehicle for attacking a conviction". ***United States v. Drobny***, 955 F.2d 990, 996 (5th Cir. 1992).

> *Coram nobis* is appropriate only where the petitioner can demonstrate that he is suffering civil disabilities as a consequence of the criminal convictions and that the challenged error is of sufficient magnitude to justify the extraordinary relief. In *United States v. Morgan*, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248 (1954), the Supreme Court held that *coram nobis* should issue to correct only errors which result in a complete miscarriage of justice. An error of "the most fundamental character" must have occurred and no other remedy may be available. *Id*. at 512, 74 S.Ct. at 253.

United States v. Marcello, 876 F.2d 1147, 1154 (5th Cir. 1989) (citations omitted).

The district court denied Fraley's petition because it determined that Fraley was challenging only the denial of his motion for a new trial and, therefore, had not demonstrated entitlement to the extraordinary relief of a writ of error *coram nobis*.

Without question, Fraley's petition is subject to the interpretation given it by the district court. Fraley is still in custody. And, in his petition, he stated that he was not attacking his conviction and sentence but, instead, was seeking to reinstate his right to proceed on his Fed. R. Crim. P. 33 motion for a new trial.[4] In several places in his 66-page petition, Fraley stated that he was *not* seeking habeas

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[4] Fraley stated:

> This Petition exclusively attacks and brings to the attention of this Court errors concerning the proceedings surrounding the Rule 33 and other post-trial motions, which render the conclusions and the judgements of denial of them void and error.
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> ....
>
> The defendant-petitioner, though in custody, is not attacking his conviction and sentence, per se, but is pointing out Constitutional errors in the proceedings surrounding the Rule 33 Motion and other post-trial motions he brought before the Court, as well as factual errors uncorrected in those

relief:

> This action is not civil in nature nor a new civil action, and does not equate in this manner with a §2255 Motion to attack a sentence or conviction. This action attacks the proceedings, by pointing out mistake and error in them which invalidates them and makes their legal conclusions and judgements void as a matter of law.
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> ....
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> A review by writ of coram nobis in lieu of habeus [*sic*] corpus is constitutionally permissible....
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> ....
>
> Under Rule 33, FRCrPr, a movant is entitled to all of the above [liberal standards and deference] under an even more liberal standard than that accorded a petitioner under a §2255 Motion. The evidence and facts must be viewed in the light MOST FAVORABLE TO THE DEFENDANT; not most favorable to the government as was done in the instant case at bar. (Under §2255 such standard gives the government that deference). An incorrect consideration using the wrong standard was plain error.

Nevertheless, in spite of his disavowal of an intent to seek relief under § 2255 or to challenge his conviction and sentence, Fraley's petition contains numerous allegations attacking the validity of his conviction, including assertions of abuse of Fed. R. Crim. P. 48(a);[5] knowing use of perjury; a ***Brady*** violation; prosecutorial misconduct; a duplicitous indictment; and ineffective assistance of counsel. And, at the conclusion of his petition, he sought "parity in treatment with other pro se pleaders in the federal courts, and this means he seeks the Court's favorable construance under the appropriate rule or practice for every contention".

It is well settled that pro se papers must be construed liberally. *E.g.*, ***Haines v. Kerner***, 404

> proceedings.
>
> ....
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> The relief herein requested by this petitioner is "outside the ambit of habeus [*sic*] corpus". He therefore has no appropriate remedy therein. The Petitioner seeks reestablishment of his right to proceed under Rule 33, FRCrP for an address of newly discovered evidence wrongfully ignored ....

[5] Fed. R. Crim P. 48(a) provides that the Government may dismiss an indictment with leave of court. Fraley alleged that the Govern-ment dismissed a previous indictment to gain a tactical advantage over him and undermine his defense.

U.S. 519, 520-21 (1972); ***Guidroz v. Lynaugh***, 852 F.2d 832, 834 (5th Cir. 1988). "As a general proposition, review of the merits of a federal prisoner's claim is not circumscribed by the label attached". ***United States v. Santora***, 711 F.2d 41, 42 n.1 (5th Cir. 1983). "Because the essence of the pleading controls, titling and erroneous cit ation of authority have been ignored". ***Id***. "*Pro se* prisoner complaints must be read in a liberal fashion and should not be dismissed unless it appears beyond all doubt that the prisoner could prove no set of facts under which he would be entitled to relief". ***Jackson v. Cain***, 864 F.2d 1235, 1241 (5th Cir. 1989). "A habeas petition `need only set forth facts giving rise to the cause of action'". ***Guidroz***, 852 F.2d at 834 (quoting ***Bounds v. Smith***, 430 U.S. 817, 97 S. Ct. 1491, 1497 (1977)); *see also* ***Golden v. Newsome***, 755 F.2d 1478, 1480 n.4 (11th Cir. 1985) ("It is well-settled that mere errors of pleading and other matters of form will not bar consideration of the *pro se* claims of federal habeas petitioners ...."); ***Franklin v. Rose***, 765 F.2d 82, 85 (6th Cir. 1985) (liberal construction includes "active interpretation in some cases to construe a pro se petition `to encompass any allegation stating federal relief'") (quoting ***White v. Wyrick***, 530 F.2d 818, 819 (8th Cir. 1976)).

Liberally construed, Fraley's petition alleges facts which, if proven, potentially would entitle him to relief under 28 U.S.C. § 2255. Therefore, the district court should have construed his petition as one seeking such relief. *See* ***United States v. Bruno***, 903 F.2d 393, 395 n.7 (5th Cir. 1990) (construing petition for habeas relief under § 2255 as a petition for *coram nobis* relief); ***Santora***, 711 F.2d at 42 (Fed. R. Crim. P. 35 motion construed as request for relief under § 2255); ***United States v. Hay***, 702 F.2d 572 (5th Cir. 1983) (§ 2255 petition treated as petition for writ of error *coram nobis*); ***United States v. Brown***, 413 F.2d 878 (9th Cir. 1969) (motion under Rule 35 or for *coram nobis* treated as § 2255 motion), *cert. denied*, 397 U.S. 947 (1970); ***United States v. Coke***, 404 F.2d 836 (2d Cir. 1968) (§ 2255 petition reviewed under standards of Rule 35); ***Jones v. United States***, 400 F.2d 892 (8th Cir. 1968) (motion for correction of sentence treated as § 2255 petition), *cert. denied*, 394 U.S. 991 (1969); ***Hixon v. United States***, 268 F.2d 667 (10th Cir. 1959) (Rule 35 motion treated as § 2255 petition).

We are aware that this result may seem incongruous, given Fraley's obvious awareness of § 2255 and his express disavowal of an intent to proceed under that section. Our precedent constrains us, however, to consider Fraley's lack of formal legal training, and the possibility that his choice of an inappropriate legal mechanism for the relief he seeks stems from that.

B.

In September 1991, three days after the district court denied *coram nobis* relief, Fraley filed motions for change of venue and for recusal of the magistrate judge. The Government responded that the motions should be denied because, except for the *coram nobis* proceeding, there was no pending proceeding to which the motions could apply.[6] The district court denied both motions. Fraley filed an addendum to the motions and a Fed. R. Civ. P. 59(e) motion for reconsideration of the denial of the motions, asserting that pending was a motion for contempt against the Government for failing to comply with the district court's order to return his seized property. The district court denied the motion for reconsideration, and Fraley filed a timely notice of appeal.

The Government maintains, as it did in district court that we do not have jurisdiction to consider Fraley's appeal from the denial of his motions, because there was no proceeding pending before the district court to which those motions could apply.

1.

As stated, Fraley's change of venue motion applied only to his motion for contempt. The docket sheet indicates that, on October 18, 1990, Fraley filed a "Motion for Judgement of Contempt" against the Government for failing to comply with the district court's order to return his seized property.[7] The record contains no indication that the district court ever ruled on the motion for contempt. Because the motion for contempt has not been ruled on, the order denying Fraley's change of venue motion is not a final, appealable order. *See* ***Stelly v. Employers Nat'l Ins. Co.***, 431 F.2d

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[6] In his change of venue motion, Fraley stated that it did not apply to the *coram nobis* proceeding.

[7] Although the docket sheet reflects that the motion for contempt was filed with the Clerk, and the Government responded to it, the motion is not in the record.

1251, 1253 (5th Cir. 1970), *cert. denied*, 401 U.S. 908 (1971).

2.

Fraley's motion for recusal referred to "any proceeding", including "any referral to [the magistrate judge] for any reason whatsoever", and specifically referenced the motion for change of venue and the *coram nobis* petition. Insofar as the denial of Fraley's motion for recusal pertains to his motion for contempt or his motion for change of venue, we do not have appellate jurisdiction to review it. However, the denial of recusal with respect to the *coram nobis* proceeding is reviewable.

The Government asserts that Fraley waived the recusal issue by failing to address it in his brief. Fraley raised the issue in his opening brief, but did not argue it in the body of his brief; however, in his reply brief, he responded to the Government's argument on this issue. "Fed.R.App.P. 28(a)(4) requires that the appellant's argument contain the reasons he deserves the requested relief `with citation to the authorities, statutes and parts of the record relied on'." ***Yohey v. Collins***, 985 F.2d 222, 225 (5th Cir. 1993) (quoting ***Weaver v. Puckett***, 896 F.2d 126, 128 (5th Cir.), *cert. denied*, 498 U.S. 966 (1990) (citations omitted)). "Although we liberally construe the briefs of pro se appellants, we also require that arguments must be briefed to be preserved". ***Id***. "[An] appellant cannot raise new issues in a reply brief; he can only respond to arguments raised for the first time in the appellee's brief." ***Stephens v. C.I.T. Group/Equipment Financing, Inc.***, 955 F.2d 1023, 1026 (5th Cir. 1992) (citation omitted). Issues which are raised, but not argued, are considered to have been abandoned. ***Yohey***, 985 F.2d at 224-25. Assuming, *arguendo*, that Fraley did not abandon this issue by failing to address it in his opening brief, we conclude that it does not have merit.

Fraley moved to recuse Magistrate Judge Tolle on the ground that he was personally biased against Fraley. We review the denial of a motion for recusal for an abuse of discretion. ***United States v. MMR Corp.***, 954 F.2d 1040, 1044 (5th Cir. 1992). Fraley's allegations of bias were based on the magistrate judge's consistent adverse rulings against him, and the fact that the magistrate judge was a defendant in a pending civil rights action. Needless to say, adverse rulings in a case are not an adequate basis for demanding recusal. ***Id***. at 1045. Fraley's conclusory allegations that the magistrate

judge is biased because of an unnamed pending lawsuit are legally insufficient to require recusal. Fraley did not indicate where the lawsuit is pending, provide a case caption, or describe the allegations against the magistrate judge.

III.

Fraley's appeal from the denial of his motion for change of venue, and from the denial of recusal with respect to any proceeding other than the *coram nobis* proceeding, is **DISMISSED**. The portion of the order denying recusal with respect to the *coram nobis* proceeding is **AFFIRMED**. The order dismissing the petition for a writ of error *coram nobis* is **VACATED**, and the case is remanded with instructions to construe Fraley's petition as one for relief under 28 U.S.C. § 2255.

DISMISSED in part; AFFIRMED in part; VACATED in part; and REMANDED